



**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA**

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Application of San Diego Gas & Electric
Company (U902E) to Amend Renewable
Energy Power Purchase Agreement with
NaturEner Rim Rock Wind Energy, LLC and
for Authority to Make a Tax Equity
Investment in the Project

Application 10-07-017
(Filed July 15, 2010)

**PETITION FOR MODIFICATION OF DECISION 11-07-002 BY SAN DIEGO GAS &
ELECTRIC COMPANY (U 902E) AND NATURENER RIM ROCK WIND ENERGY,
LLC**

**** PUBLIC VERSION ****

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February 16, 2016

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I. INTRODUCTION

Pursuant to Rule 16.4 of the California Public Utilities Commission's ("CPUC" or "Commission") Rules of Practice and Procedure, San Diego Gas & Electric Company ("SDG&E") and NaturEner Rim Rock Wind Energy, LLC ("NaturEner Rim Rock") respectfully submit this petition for modification of Decision ("D.") 11-07-002. Both SDG&E and NaturEner Rim Rock were parties to the proceeding that led to D.11-07-002.

In D.11-07-002, the Commission, among other things, approved certain amendments to a Green Attributes Power Purchase Agreement ("Green Attributes PPA") with NaturEner Rim Rock (together with its affiliates NaturEner USA, LLC, NaturEner Montana Wind Holding, LLC, NaturEner Rim Rock Financing, LLC, and NaturEner Montana Wind Rim Rock, LLC, collectively "NaturEner"), authorized SDG&E to make a tax equity investment in the Rim Rock Wind Energy Project ("Project") pursuant to an Equity Capital Contribution Agreement ("ECCA"), approved SDG&E's request to modify its long-term procurement plan to allow it to hedge the null power sales from the Project for a period of up to ten years and approved SDG&E's request to provide credit support, as necessary, to the Project.

Although the Project has commenced commercial operations and SDG&E is making conditional payments under the PPA, SDG&E has not made the tax equity investment in the Project. There is pending litigation over whether NaturEner has met certain conditions set forth in the transaction documents, including certain environmental conditions related to the protection of birds and bats (“Avian Conditions”).

In an attempt to resolve this pending litigation – currently scheduled for trial in San Diego Superior Court for May 6, 2016 - SDG&E, NaturEner, Grupo NaturEner, S.A. and Morgan Stanley (the current controlling equity owner of NaturEner), together with its affiliates Morgan Stanley & Co. LLC, Morgan Stanley Senior Funding, Inc., Morgan Stanley Capital Services, LLC, Morgan Stanley Renewable Development Fund, LLC, and Morgan Stanley Capital Group, Inc. (collectively “Morgan Stanley”), have entered into this proposed Settlement Agreement and Mutual Release (“Avian Conditions Settlement Agreement”) that requires the Commission’s approval before it can become final.¹ ***Although SDG&E and NaturEner anticipate that the court likely will grant the parties an extension of the May 6, 2016 trial date, SDG&E and NaturEner Rim Rock are requesting the Commission’s prompt review and approval of this petition and the proposed Avian Conditions Settlement Agreement pursuant to the schedule set forth in Section VI below.*** The proposed Avian Conditions Settlement Agreement is attached herein as Attachment A.

Under the proposed Avian Conditions Settlement Agreement, SDG&E would continue with the Green Attributes PPA (with a couple of minor modifications), but not make the tax equity investment in the Project. SDG&E also would proceed with a slightly modified version of the hedging agreement SDG&E entered into with Morgan Stanley that arose out of and was

¹ Pursuant to Section 2.1.1 of the Avian Conditions Settlement Agreement, certain Morgan Stanley entities will intervene in this proceeding and request party status.

contemplated in the transaction. These proposed changes are described in greater detail in Section III below.

Per Rule 16.4(d), SDG&E and NaturEner Rim Rock were not able to file this petition “within one year of the effective date of the decision proposed to be modified” because the dispute over the conditions precedent that gave rise to the litigation between SDG&E and NaturEner only ripened in December 2013, when the litigation was filed, and SDG&E, NaturEner, Grupo NaturEner, S.A. and Morgan Stanley have only recently entered into the proposed Avian Conditions Settlement Agreement to resolve the litigation. The proposed Avian Conditions Settlement Agreement is now before the Commission.²

II. BACKGROUND

The background for this proposed Avian Conditions Settlement Agreement is largely set forth in D.11-07-002, the 2011 settlement agreement the Commission approved in D.11-07-002, and in the recitals of the proposed Avian Conditions Settlement Agreement. The pertinent background information includes the following.

A. Resolution E-4277

Commission Resolution E-4277 (November 20, 2009) approved SDG&E’s Advice Letter 2088-E for a 309-megawatt (“MW”) PPA with NaturEner Rim Rock for the Project.

As the Commission summarized in D.11-07-002 (at p. 4), the PPA was intended to meet part of SDG&E’s renewable portfolio standard (“RPS”) procurement goals under the California RPS Program, codified at Public Utilities Code §§ 399.11 et seq. Under the PPA, SDG&E ratepayers pay for the power produced when the Project is online and generating but sell the null

² Under Rule 16.4(d), “[i]f more than one year has elapsed, the petition must . . . explain why the petition could not have been presented within one year of the effective date of the decision.”

power³ back to the project company, which in turn resells the null power. *Id.* SDG&E retains the green attributes in the form of Renewable Energy Credits (“RECs”), which are delivered to California under RPS deliverability guidelines of the California Energy Commission (“CEC”). The CEC has verified that the purchase/sale/delivery mechanism under the PPA is RPS eligible. *Id.*

B. SDG&E’s July 15, 2010 Tax Equity Application

In response to the financial crisis and NaturEner’s difficulties in securing financing for the Project, SDG&E filed an application on July 15, 2010 (A.10-07-017) requesting, among other things, several amendments to the PPA, authority to make a tax equity investment in the Project of up to \$600M, modifications of SDG&E’s long-term procurement plan to allow it to enter into hedging arrangements for a period of up to ten years (instead of SDG&E’s then-current authority of five years) and SDG&E’s provision of credit support, as necessary, to the Project.

The Division of Ratepayer Advocates (“DRA”) (subsequently renamed the Office of Ratepayer Advocates or ORA) and The Utility Reform Network (“TURN”) protested SDG&E’s application and presented testimony in opposition to it, which led to five days of evidentiary hearings in December 2010.

C. The April 8, 2011 Settlement Agreement and the Commission’s Approval of the Settlement in D.11-07-002

On April 8, 2011, SDG&E, NaturEner Rim Rock, ORA and TURN filed a motion for approval of a settlement agreement resolving all issues in SDG&E’s pending application.

The terms of the 2011 settlement included, among other things:

³ As the Commission explained in D.11-07-002 (at p. 4, fn. 7), “[n]ull power is a term used to describe energy stripped of all of the environmental and renewable attributes - also called green attributes - of renewable electricity.”

- A reduction in the size of the Project from 309MW to 189MW.
- A reduction in the amount of ratepayers' tax equity investment contribution from a cap of \$600M to a cap of \$250M.
- Approval of SDG&E's request to modify its long-term procurement plan to allow it to enter into hedging arrangements for a period of up to ten years.⁴
- Approval of SDG&E's request to provide credit support, as necessary, to the Project.⁵
- Establishment of detailed information requirements for SDG&E and NaturEner to provide to ORA, TURN and the Energy Division leading up to Construction Financial Closing ("CFC").⁶

On July 21, 2011, the Commission approved the 2011 settlement agreement, with one modification not relevant to this discussion.

D. Events Leading to Construction Financial Closing on January 6, 2012

After the Commission approved the 2011 settlement agreement in D.11-07-002, SDG&E and NaturEner proceeded to provide to ORA, TURN and the Energy Division the additional information regarding the proposed transaction identified in Section 3 of the 2011 settlement agreement. SDG&E also continued with its due diligence into the Project.

Multiple meetings and conference calls during this due diligence period ultimately led to ORA and TURN's selection of a final Base Case Model ("BCM"), which reflected the final

⁴ Section 2(b) of the 2011 settlement agreement requested Commission approval of "SDG&E's request to modify its current long-term procurement plan to allow it to enter into hedging arrangements for a period of up to ten years in order to ensure price stability for the null power sales associated with the transaction as set forth in the Pending Application and SDG&E's testimony."

⁵ Section 2(c) of the 2011 settlement agreement requested Commission approval of "SDG&E's request to provide credit support as necessary to the project company pursuant to P.U. Code Section 701.5(c) and for approval of any associated costs as set forth in the Pending Application and SDG&E's testimony."

⁶ For example, Section 3(d)(i) of the 2011 settlement agreement required SDG&E and NaturEner to provide ORA, TURN and the Director of the Energy Division "the identity of the 'short list' of prospective counter-parties to the hedge or fixed-price contract for the sale of null power from the Project, the overall status of negotiations of the hedge or fixed price contract, including the anticipated price ranges, the quantity of energy subject to the hedge or fixed price contract, other terms that may affect the results of the Base Case Model, and the status of any credit support and firming and shaping arrangements." In Section 3(f) of the 2011 settlement agreement, "[t]he Parties acknowledge[d] that a final hedge price for null power may not be available" 30 days prior to CFC, but SDG&E was able to provide this information to ORA, TURN and the Energy Division more than 30 days prior to CFC.

Project documents and structure and a computation of a final Green Attributes price. These efforts also led to SDG&E's execution on October 26, 2011 of the hedging agreement with Morgan Stanley contemplated in the 2011 settlement agreement. The October 26, 2011 Master Power Purchase and Sale Agreement with Morgan Stanley also is referred to as the "NOB PPA" based on its delivery point at the Nevada-Oregon Border.⁷

These oversight and diligence activities also led to the issuance by the Commission's Director of the Energy Division on December 22, 2011 of the Energy Division Authorizing Letter (attached herein as Attachment B). The Energy Division Authorizing Letter allowed SDG&E and NaturEner to proceed with CFC and the execution of the Green Attributes PPA and the ECCA, which occurred on January 6, 2012.⁸

E. From January 6, 2012 CFC to the Proposed Avian Conditions Settlement Agreement

After CFC occurred on January 6, 2012, NaturEner proceeded with construction of the project and its efforts to meet the conditions set forth in both the Green Attributes PPA and the ECCA. During the course of NaturEner's construction, SDG&E raised questions about

⁷ On January 30, 2012, SDG&E submitted its Quarterly Compliance Report ("QCR") for the 4th Quarter of 2011 in Advice Letter 2329-E "demonstrating that its procurement-related transactions during the period October 1, 2011 through December 30, 2011 were in compliance with the latest Commission-approved AB 57 Long-Term Procurement Plan ("LTTP") adopted by the Commission in Resolution E-4189." SDG&E's October 26, 2011 Master Power Purchase and Sale Agreement with Morgan Stanley was part of this showing, which the Commission approved on October 8, 2012.

⁸ As set forth in Section 3(h) of the 2011 settlement agreement, "[i]n the event that no timely Objection to Updated BCM Inputs is asserted . . . the Director of the Energy Division shall issue a letter ('Energy Division Authorizing Letter') providing SDG&E authority to:

- (i) proceed with the Updated BCM, adjusted consistent with the Base Case Model selected in accordance with Section 3(f)(iv), as it may be further updated by the actual executed hedge price or fixed price contract, and
- (ii) execute the Amended Transaction Agreements and perform its obligations thereunder.

The Parties agree that the purpose of the Energy Division Authorizing Letter is to confirm that SDG&E and [NaturEner] are proceeding to implement the Amended Transaction Agreements and run the Base Case Model in a manner consistent with the Commission's approval of this Settlement Agreement, and that, accordingly, the issuance of the Energy Division Authorizing Letter is not subject to an appeal to or request for rehearing with the full Commission."

NaturEner's ability to meet certain conditions set forth in the January 6, 2012 agreements, including certain environmental conditions related to the protection of birds and bats in the ECCA⁹ and the Green Attributes PPA¹⁰ (collectively, the "Avian Conditions").

On October 3, 2013, SDG&E and NaturEner agreed to extend the deadline for satisfaction of the Avian Conditions. On December 15, 2013, NaturEner sent SDG&E a letter asserting that, among other things, the Avian Conditions had been satisfied. On December 19, 2013, SDG&E sent NaturEner a letter detailing, among other things, why it disagreed that the Avian Conditions had been met.

On December 19, 2013, SDG&E filed a complaint against NaturEner, as amended on October 17, 2014, in the Superior Court of the State of California for, among other things, declaratory relief regarding the Avian Conditions, negligent misrepresentation, fraud and breach of contract. On December 20, 2013, NaturEner filed a complaint against SDG&E in Montana and on June 4, 2014, NaturEner filed a cross-complaint against SDG&E in San Diego Superior

⁹ Section 2.5(ii) of the ECCA states that one of the conditions precedent that must be satisfied before SDG&E is obligated to make its tax equity investment is that: "[NaturEner] shall have (1) a Final Avian and Bat Protection Plan ("ABPP") [subsequently renamed the Bird and Bat Conservation Strategy or "BBCS"] developed in consultation with the United States Fish & Wildlife Service ("USFW") that (a) describes the steps [NaturEner] has taken or will take to avoid, minimize, and/or mitigate the effects of the Project to birds and bats, including Bald and Golden Eagles, and the post-construction monitoring and reporting efforts [NaturEner] intends to undertake in connection with the Project, and (b) is reasonably satisfactory in form and substance to [SDG&E], and (2) a written record of consultation with USFW demonstrating to the reasonable satisfaction of [SDG&E] that an eagle permit under the Bald and Golden Eagle Protection Act will not be required or recommended for the Project by USFW. [SDG&E] shall be reasonably satisfied that compliance with the terms and conditions of such ABPP does not result in any (i) Liabilities to [NaturEner] of a material nature, (ii) the Base Case Model has been updated to reflect any other consequences of the terms and conditions of ABPP, and (iii) none of such ABPP measures could reasonably be expected to materially reduce or materially adversely alter the timing, nature or amount of the economic or tax benefits which are expected to be received by [NaturEner]."

¹⁰ Section 14.2 of the Confirmation Letter of the Green Attributes PPA states that SDG&E can terminate the PPA if the following condition subsequent is not satisfied: "[NaturEner] shall have (1) a final Avian and Bat Protection Plan ("ABPP") developed in consultation with the United States Fish & Wildlife Service ("USFW") that (a) describes the steps [NaturEner] has taken or will take to avoid, minimize and /or mitigate the effects of the Facility to birds and bats, including Bald and Golden Eagles, and the post-construction monitoring and reporting efforts [NaturEner] intends to undertake in connection with the Facility, and (b) is reasonably satisfactory in form and substance to [SDG&E], and (2) a written record of consultation with USFW that an eagle permit under the Bald and Golden Eagle Protection Act will not be required or recommended for the Project by USFW."

Court, as amended on September 11, 2015, on a variety of causes of action, including breach of contract, breach of the implied covenant of good faith and fair dealing, and tortious interference with contracts. The parties have been vigorously litigating these actions since the date of filing.

The proposed Avian Conditions Settlement Agreement, executed on February 11, 2016, is an attempt to resolve these matters without further litigation.

III. DESCRIPTION OF THE PROPOSED AVIAN CONDITIONS SETTLEMENT AGREEMENT AND THE PROPOSED MODIFICATIONS TO D.11-07-002

A. Description of the Proposed Avian Conditions Settlement Agreement

The key terms of the proposed Avian Conditions Settlement Agreement are summarized as follows:¹¹

- SDG&E will *not* go forward with its tax equity investment in the Project.
- SDG&E will proceed with the Green Attributes PPA, with the proposed modifications described in more detail in Section III.B below.
- SDG&E will proceed with the NOB PPA, with the proposed modifications described in more detail in Section III.B below.
- NaturEner and Morgan Stanley will remit to SDG&E a lump sum payment in the amount of \$[REDACTED], of which SDG&E will credit \$[REDACTED] to its Energy Resource Recovery Account (“ERRA”) and apply the remaining \$[REDACTED] to offset its external legal costs from the pending litigation.¹²
- SDG&E, NaturEner and Morgan Stanley will reserve their rights with respect to potential claims in connection with the California Air Resources Board’s reporting regulation for greenhouse gas emissions and cap-and-trade regulation as it relates to the Green Attributes PPA.

A complete copy of the proposed Avian Conditions Settlement Agreement is appended to this petition as Attachment A.

¹¹ This summary is qualified in its entirety by the Avian Conditions Settlement Agreement, which will control the parties’ rights if the Commission approves it.

¹² SDG&E’s Rim Rock litigation costs have been recorded in SDG&E’s Litigation Expense and Capital accounts; the offset would be applied to these accounts in the same proportion in which the costs originally were recorded.

B. Description of the Proposed Modifications to D.11-07-002

SDG&E and NaturEner Rim Rock propose modifications to the transaction documents that were the subject of and/or anticipated by the Commission's approval in D.11-07-002 of the 2011 settlement agreement.

Under the terms of the proposed Avian Conditions Settlement Agreement, the following changes would be made to the Green Attributes PPA:¹³

- Section 5.1(m) of the Cover Sheet would be deleted in its entirety to eliminate a default under the ECCA as a default under the Green Attributes PPA to reflect the fact that SDG&E will not be making the tax equity investment in the Project.
- Section 10(e) of the Cover Sheet (one paragraph from Section 10.6 of the Master Agreement) would be modified to clarify the venue provision in the event of a future dispute.
- Section 14.2 of the Confirmation Letter would be deleted in its entirety.
- As set forth in Section 3.2 of the proposed Avian Conditions Settlement Agreement, NaturEner Rim Rock would apply for an eagle take permit under the Bald and Golden Eagle Protection Act from the United States Fish & Wildlife Service.

Under the terms of the proposed Avian Conditions Settlement Agreement, the following changes would be made to the NOB PPA:¹⁴

- In the Confirmation Letter, the condition requiring SDG&E to have made its tax equity investment in the Project for Term 2 to proceed would be deleted.¹⁵
- In the Confirmation Letter, provisions would be added that reduce, on a financial basis, the volumes delivered under Term 2 to the extent energy production at the Project is less than 3,325,000 MWh at the end of Term 2, with adjustments made on a year over year basis relative to an annual baseline equal to 475,000 MWh.

¹³ A complete copy of the Green Attributes PPA, as executed on January 6, 2012, is attached as Attachment C. The proposed amendments to the Green Attributes PPA are set forth as Exhibit B of the proposed Avian Conditions Settlement Agreement. The summary of the terms provided in the text is qualified in its entirety by the Green Attributes PPA, which will control the parties' rights if the Commission approves it.

¹⁴ A complete copy of the NOB PPA, as executed on October 26, 2011, is attached as Attachment D. The proposed amendments to the NOB PPA are set forth in Exhibits C-1 and C-2 of the proposed Avian Conditions Settlement Agreement. The summary of the terms provided in the text is qualified in its entirety by the NOB PPA, which will control the parties' rights if the Commission approves it.

¹⁵ The condition requiring the occurrence of Project COD also would be deleted because Project COD under the NOB PPA also was conditioned on SDG&E making its tax equity investment.

IV. DISCUSSION

A. Consistent with the Commission's Policy Favoring Settlements, the Commission Should Approve the Proposed Avian Conditions Settlement Agreement

As the Commission has stated many times, including in D.11-07-002, the Commission has a strong and longstanding policy of favoring settlements, which is designed to support “many worthwhile goals, including reducing the expense of litigation, conserving scarce Commission resources, and allowing parties to reduce the risk that litigation will produce unacceptable results.”¹⁶

In this instance, SDG&E, NaturEner and Morgan Stanley have been vigorously engaged in litigation for more than two years, since December 2013. In SDG&E's complaint, SDG&E alleges negligent misrepresentation, fraud and breach of contract and seeks to rescind the Green Attributes PPA and the ECCA and to recover, among other things, compensatory and punitive damages. In NaturEner's cross complaint, NaturEner alleges, among other things, that SDG&E breached the Green Attributes PPA and the ECCA, that SDG&E breached the implied covenant of good faith and fair dealing with respect to the ECCA, and that SDG&E tortiously interfered with two of its contracts with Morgan Stanley (the Construction Loan Agreement and its null power agreement with Morgan Stanley). In its cross complaint, NaturEner requests that the court, among other things, order SDG&E to specifically perform under the ECCA and order SDG&E to pay compensatory and punitive damages.

The proposed Avian Conditions Settlement Agreement will resolve this contentious litigation and allow the parties to move forward on a more constructive basis.

¹⁶ D.11-07-002 at p. 14 and footnotes 12 and 13 (*citing* D.09-10-046 at pp. 8-9, D.88-12-083, D.08-01-043 at p. 10 and D.05-03-022).

PUBLIC (REDACTED) VERSION

If the Commission does not approve the proposed Avian Conditions Settlement Agreement, SDG&E, NaturEner and Morgan Stanley will proceed with the trial in San Diego Superior Court, currently scheduled for May 6, 2016. The trial will be very expensive to litigate, but would not result in the end of the litigation because it is highly likely that the losing party would appeal any adverse judgment, resulting in further expense and a diversion of resources, for a couple of additional years, from our respective core businesses. Thus, approval of the proposed Avian Conditions Settlement Agreement would allow the parties to reduce the expense of litigation.

Approving the proposed Avian Conditions Settlement Agreement also would “reduce the risk that litigation will produce unacceptable results.” For example, if SDG&E ultimately prevails in the litigation, SDG&E will not go forward with the tax equity investment and will terminate the Green Attributes PPA, which would be unacceptable to NaturEner and Morgan Stanley. On the other hand, if NaturEner and Morgan Stanley ultimately prevail in the litigation, there could be a number of unacceptable outcomes to SDG&E, including an obligation to pay significant damages.

Although SDG&E, NaturEner and Morgan Stanley believe strongly in the merits of their respective litigation positions, each recognizes that the outcome of any litigation is uncertain. Therefore, it is reasonable to settle the disputed claims on a basis acceptable to each. The proposed Avian Conditions Settlement reflects such a compromise.

In summary, the Commission should approve the proposed Avian Conditions Settlement Agreement as consistent with its policy of favoring settlements.

B. The Proposed Avian Conditions Settlement Agreement is Reasonable and Provides Other Important Benefits

In addition to resolving very contentious, expensive and lengthy litigation - as described in the preceding section - the proposed Avian Conditions Settlement Agreement also would provide other important benefits. These benefits include:

- Although the tax equity investment that the Commission approved in D.11-07-002 contained very significant ratepayer protections, by not going forward with the tax equity investment – per the terms of the proposed Avian Conditions Settlement Agreement – any residual potential investment risks will be eliminated in their entirety.¹⁷
- Ratepayers also will receive a significant credit to SDG&E’s ERRA that can be applied to reduce the payments under the Green Attributes PPA and the NOB PPA.
- NaturEner will apply for an eagle take permit with the U.S. Fish & Wildlife Service.
- The volumes delivered to SDG&E under Term 2 of the NOB PPA by Morgan Stanley may, under certain circumstances, be reduced.
- SDG&E also will benefit from the revised venue provision in the Green Attributes PPA.

In summary, the proposed Avian Conditions Settlement Agreement provides significant additional benefits that support Commission approval of this petition for modification.

V. RELIEF REQUESTED

In this petition for modification, SDG&E and NaturEner Rim Rock respectfully request that the Commission promptly:

- Approve the minor proposed amendments to the Green Attributes PPA and the NOB PPA set forth herein.
- Approve the proposed Avian Conditions Settlement Agreement.
- Approve cost recovery for the amended Green Attributes PPA and the amended NOB PPA.

¹⁷ For example, the several lost years of production tax credits (“PTCs”) would result in a less certain stream of cash flows to pay back the investment.

- Approve SDG&E's proposed ratemaking treatment for the settlement proceeds.¹⁸
- Grant such other relief as is necessary and proper.

VI. PROPOSED SCHEDULE

As explained above, SDG&E, NaturEner and Morgan Stanley are facing a May 6, 2016 trial date. Although SDG&E and NaturEner anticipate that the San Diego Superior Court likely will grant an extension of this trial date, in light of the relatively minor modifications proposed to the Green Attributes PPA and the NOB PPA, SDG&E and NaturEner Rim Rock request that the Commission approve this petition for modification as soon as possible. At a minimum, SDG&E and NaturEner Rim Rock are requesting a final and non-appealable decision on this petition by no later than August 30, 2016, which represents the Settlement Deadline Date set forth in the Avian Conditions Settlement Agreement.¹⁹

To achieve this objective, SDG&E and NaturEner Rim Rock propose the following schedule for the Commission's processing and approval of this petition for modification:

- Responses to the petition for modification: 30 days after the filing of this petition for modification.²⁰
- Petitioners' reply: 10 days after the filing of responses.²¹
- Administrative Law Judge Proposed Decision: No later than June 14, 2016 (30 days in advance of the Commission's July 2016 meeting).
- Commission decision: No later than July 14, 2016 (July 14, 2016 is the Commission's only currently-scheduled meeting in July)
- Final and non-appealable Commission decision: August 14, 2016.²²

¹⁸ While NaturEner Rim Rock supports SDG&E's request for approval of cost recovery for the Green Attributes PPA and the amended NOB PPA, and supports SDG&E's request for approval of its proposed ratemaking treatment for the settlement proceeds, NaturEner Rim Rock defers to SDG&E to justify and explain these proposals to the Commission.

¹⁹ Section 1.2 of the proposed Avian Conditions Settlement Agreement requires the Commission to have issued a final and non-appealable decision approving the proposed settlement by no later than August 30, 2016, which, as stated above, is the Settlement Deadline Date and represents one day before the commencement of certain performance and payment obligations on September 1, 2016 under Term 2 of the NOB PPA.

²⁰ Under Rule 16.4(f), 30 days is the standard period of time for parties to respond to petitions for modification.

²¹ Under Rule 16.4(g), petitioners, with the permission of the ALJ, have 10 days to file a reply to responses.

VII. CONCLUSION

In conclusion, SDG&E and NaturEner Rim Rock respectfully request that the Commission promptly grant this petition for modification, approve the proposed Avian Conditions Settlement Agreement and grant the other relief requested under the schedule proposed above.

Respectfully submitted,

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Dated this 16th day of February, 2016

Attachments:

- Attachment A: Avian Conditions Settlement Agreement
- Attachment B: Energy Division Authorizing Letter
- Attachment C: Green Attributes PPA
- Attachment D: NOB PPA
- Attachment E: Declaration of Emily C. Shults

²² Commission decisions do not become final and non-appealable until the time has expired for parties to file applications for rehearing, which is “30 days after the date the Commission mails the order or decision,” per Rule 16.1(a).

PUBLIC (REDACTED) VERSION

Attachment A

REDACTED VERSION

Avian Conditions Settlement Agreement

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

This Settlement Agreement and Mutual Release (the "Agreement") is made and entered into as of the 11th day of February, 2016 (the "Execution Date") by and among San Diego Gas & Electric Company, a California corporation ("SDG&E"), Grupo NaturEner, S.A., a corporation (*sociedad anónima*) organized under the laws of Spain ("Grupo NaturEner"), NaturEner USA, LLC, a Delaware limited liability company ("NaturEner USA"), NaturEner Montana Wind Holding, LLC, a Delaware limited liability company ("NaturEner Borrower"), NaturEner Rim Rock Financing, LLC, a Delaware limited liability company ("Rim Rock Developer Member"), NaturEner Montana Wind Rim Rock, LLC, a Delaware limited liability company ("Rim Rock Holdco"), NaturEner Rim Rock Wind Energy, LLC, a Delaware limited liability company ("Rim Rock" and together with NaturEner USA, NaturEner Borrower, Rim Rock Developer Member, and Rim Rock Holdco, the "NaturEner USA Parties"; and the NaturEner USA Parties together with Grupo NaturEner, "NaturEner"), Morgan Stanley, a Delaware corporation ("MS"), Morgan Stanley & Co. LLC, a Delaware limited liability company ("MS LLC"), Morgan Stanley Senior Funding, Inc., a Delaware corporation ("MSSF"), Morgan Stanley Capital Services, LLC, a Delaware limited liability company ("MSCS"), Morgan Stanley Renewable Development Fund, LLC, a Delaware limited liability company ("MS NUSA Member"), and Morgan Stanley Capital Group, Inc., a Delaware corporation ("MSCG" and together with MS, MS LLC, MSSF, MSCS, and MS NUSA Member, "Morgan Stanley"). SDG&E, Grupo NaturEner, NaturEner USA, NaturEner Borrower, Rim Rock Developer Member, Rim Rock Holdco, Rim Rock, NaturEner, MS, MS LLC, MSSF, MSCS, MSCG, and Morgan Stanley shall be collectively referred to as the "Parties" and individually referred to as a "Party."

Recitals

A. SDG&E and Rim Rock entered into (i) that certain Master Power Purchase & Sale Agreement Cover Sheet and related Master Power Purchase and Sale Agreement (the "Original Master Agreement"), dated as of May 5, 2009; and (ii) that certain Confirmation Letter for Renewable Power, also dated as of May 5, 2009 (the "Original Confirmation," and together with the Original Master Agreement, the "Original Green Attributes PPA").

B. SDG&E filed Advice Letter 2088-E on May 29, 2009 requesting approval by the California Public Utilities Commission ("CPUC") of the Original Green Attributes PPA and on November 20, 2009, the CPUC approved the Original Green Attributes PPA in Resolution E-4277 in its entirety and without any modifications.

C. As a result of financing challenges for renewable project developers related to the 2008 financial liquidity crisis and other considerations, on July 12, 2010, SDG&E and NaturEner USA entered into the Participation Agreement which contemplated a potential tax equity investment by SDG&E in the Rim Rock project and an amendment of the Original Green Attributes PPA, subject to the satisfaction of certain conditions precedent.

D. On July 15, 2010, SDG&E filed application A.10-07-017 with the CPUC requesting approval of, among other matters: (i) SDG&E's tax equity investment in the Rim Rock project holding company; (ii) SDG&E's proposed ratemaking and cost recovery proposal for the tax equity investment; (iii) SDG&E's execution of an amended Original Green Attributes

PPA; (iv) SDG&E's rate recovery of all costs associated with the amended Original Green Attributes PPA, subject to Commission review of SDG&E's administration of the contract; (v) SDG&E's modification of its current long-term procurement plan to allow it to enter into hedging arrangements for a period of up to ten years; (vi) SDG&E's provision of credit support, as necessary, to the Rim Rock project company; (vii) SDG&E's request for CPUC approval of any limited waivers of the CPUC's Affiliate Transaction Rules; and (viii) any other relief as necessary and proper.

E. On April 8, 2011, the Office of Ratepayer Advocates (formerly known as the Division of Ratepayer Advocates, "ORA"), Rim Rock, SDG&E, and The Utility Reform Network ("TURN"), entered into a Settlement Agreement ("CPUC Settlement Agreement") pursuant to which the parties thereto agreed that in consideration for certain modifications to the Participation Agreement and the establishment of procedural and other protections for ratepayers, the CPUC should authorize SDG&E to execute and perform the amended Participation Agreement and grant the other requests made by SDG&E in application A.10-07-017.

F. On July 14, 2011, subject to additional modifications and conditions, the CPUC granted the requests made by SDG&E in application A.10-07-017 as modified by the CPUC Settlement Agreement.

G. On October 26, 2011, SDG&E (in reliance on the CPUC's approval of, among other things, (i) SDG&E's modification of its current long-term procurement plan to allow it to enter into hedging arrangements for a period of up to ten years and (ii) SDG&E's provision of credit support, as necessary, to the Rim Rock project company) and MSCG entered into the EEI Master Power Purchase & Sale Agreement Cover Sheet and related EEI Master Power Purchase and Sale Agreement, including the schedules, annexes, and exhibits attached thereto, and the Master Power Purchase and Sale Agreement Confirmation Letter (collectively, the "NOB PPA").

H. On December 20, 2011, after receiving updates about the transaction from SDG&E and Rim Rock, the Energy Division of the CPUC sent a letter to SDG&E (the "Energy Division Authorizing Letter") authorizing SDG&E to proceed with the transactions described in the CPUC Settlement Agreement.

I. On December 30, 2011, NaturEner Borrower entered into the Construction Loan Agreement (as amended from time to time, the "Loan Agreement"), with the financial institutions listed on Schedule 1 thereto or who later become party thereto and MSSF, as administrative agent.

J. On January 6, 2012, SDG&E (in reliance on the Energy Division Authorizing Letter and the CPUC's approval of, among other things, (i) SDG&E's tax equity investment in the Rim Rock project holding company and (ii) SDG&E's proposed ratemaking and cost recovery proposal for the tax equity investment), Rim Rock Developer Member, and Rim Rock entered into that certain Equity Capital Contribution Agreement (as amended from time to time, the "ECCA") pursuant to which, subject to certain conditions, SDG&E would make a tax equity investment in the Rim Rock project.

K. Also on January 6, 2012, SDG&E (in reliance on the Energy Division Authorizing Letter and the CPUC's approval of, among other things, (i) SDG&E's execution of an amended Original Green Attributes PPA and (ii) SDG&E's rate recovery of all costs associated with the amended Original Green Attributes PPA, subject to Commission review of SDG&E's administration of the contract) and Rim Rock amended and restated the Original Green Attributes PPA in its entirety by entering into to the Master Power Purchase & Sale Agreement Cover Sheet and related Master Power Purchase and Sale Agreement and the Confirmation Letter for Renewable Power (collectively, the "Green Attributes PPA"), pursuant to which, subject to certain conditions, SDG&E would purchase and Rim Rock would sell the Green Attributes (as defined in the Green Attributes PPA) from the Rim Rock project.

L. Also on January 6, 2012, in connection with the Loan Agreement, SDG&E, Rim Rock Financing, Rim Rock Holdco, and The Bank of New York Mellon, as collateral agent, entered into a Consent and Agreement (ECCA) (the "ECCA Consent"), pursuant to which, among other things, SDG&E consented to the assignment of the interests of Rim Rock Financing and Rim Rock Holdco in the ECCA to the collateral agent and also provided certain cure rights to the collateral agent in respect of the ECCA, in each case as more fully set forth in the ECCA Consent.

M. Also on January 6, 2012, in connection with the Loan Agreement, SDG&E, Rim Rock, and The Bank of New York Mellon, as collateral agent, entered into a Consent and Agreement (Green Attributes PPA) (the "PPA Consent" and together with the ECCA Consent, the "Lender Consents"), pursuant to which, among other things, SDG&E consented to the assignment of the interests of Rim Rock in the Green Attributes PPA to the collateral agent, and also provided certain cure rights to the collateral Agent in respect of the Green Attributes PPA, in each case as more fully set forth in the PPA Consent.

N. Regarding the Green Attributes PPA, Section 14.0 of the Confirmation sets forth conditions subsequent, one of which relates to avian and bat conditions ("PPA Avian Conditions"), that provide SDG&E with the right to terminate the Green Attributes PPA upon written notice delivered to Project Company no later than ten (10) days after the Commercial Operation Deadline (as defined in the Green Attributes PPA) if the PPA Avian Conditions have not been satisfied by the Commercial Operation Deadline.

O. Regarding the ECCA, the obligations of SDG&E to consummate the Contribution Closing and make the Closing Capital Contribution (in each case as defined in the ECCA) are subject to satisfaction of the conditions set forth in Section 2.5 of the ECCA, including, but not limited to, those conditions set forth in Section 2.5(ii) relating to avian and bat protection (the "ECCA Avian Conditions", and together with the PPA Avian Conditions, the "Avian Conditions").

P. During 2012 and 2013, NaturEner continued project development, permitting, design, construction, operation, and maintenance activities in order to satisfy the conditions in the Green Attributes PPA and the ECCA. In September of 2012, the Rim Rock project began delivering energy and Green Attributes to SDG&E.

Q. On June 4, 2013, NaturEner sent a letter to SDG&E pursuant to which, among other things, NaturEner asserted that the Avian Conditions were satisfied.

R. On June 13, 2013, SDG&E sent a letter to NaturEner stating that SDG&E was in the process of reviewing and evaluating NaturEner's conclusions in its letter dated June 4, 2013.

S. On June 22, 2013, SDG&E sent a letter to NaturEner disagreeing with NaturEner's conclusions in its letter dated June 4, 2013.

T. On July 8, 2013, SDG&E and Rim Rock entered into a Letter Agreement, that was acknowledged by the collateral agent, pursuant to which such parties acknowledged that SDG&E and Rim Rock were in a dispute resolution period thereunder that expired on August 27, 2013, and such parties agree to extend the period for performance under the Green Attributes PPA and the ECCA.

U. On October 3, 2013, SDG&E, NaturEner Borrower, Rim Rock, Rim Rock Developer Member, and Rim Rock Holdco entered into that certain Avian Conditions Agreement (as amended from time to time, the "Avian Conditions Agreement"), that was acknowledged by the collateral agent, pursuant to which, among other things, the parties thereto agreed to extend the deadline date for satisfaction of the Avian Conditions.

V. On or about October 15, 2013, NaturEner achieved Commercial Operation of the Rim Rock project under the Green Attributes PPA.

W. On December 15, 2013, NaturEner sent SDG&E a letter again asserting, among other things, that the Avian Conditions were satisfied.

X. On December 19, 2013, SDG&E sent NaturEner a letter detailing, among other things, why it disagreed that the Avian Conditions had been met.

Y. Also on December 19, 2013, SDG&E filed a complaint, as amended on March 28, 2014 and on October 17, 2014, against NaturEner in the Superior Court of the State of California for the County of San Diego (the "San Diego Action") for, among other things, declaratory relief that NaturEner had not satisfied the Avian Conditions in both the Green Attributes PPA and the ECCA, breach of contract, negligent misrepresentation, fraud, and unfair competition, and is seeking an award of punitive damages in addition to other damages sustained.

Z. On December 20, 2013, NaturEner filed a complaint against SDG&E in the Montana Ninth Judicial District Court, Toole County, Montana (the "Montana Action"), for, among other things, declaratory relief that NaturEner had satisfied the Avian Conditions in both the Green Attributes PPA and the ECCA, and breach of contract, and subsequently filed a cross-complaint on June 6, 2014, as amended on November 18, 2014, April 10, 2015, and September 11, 2015, against SDG&E in the San Diego Action for, among other things, breach of contract, breach of the implied covenant of good faith and fair dealing, intentional interference with contractual and prospective economic relations, violation of Public Utilities Code Sections 702 and 2106, and is seeking an award of punitive damages in addition to other damages sustained.

AA. In order to further extend the deadline date, the Avian Conditions Agreement was subsequently amended pursuant to that certain Termination Timeframe Amendment Agreement, dated as of December 24, 2013, that certain Amendment to Avian Conditions Agreement, dated as of January 9, 2014, that certain Second Amendment to Avian Conditions Agreement, dated as of February 10, 2014, and that certain Third Amendment to Avian Conditions Agreement, dated as of February 26, 2014.

BB. On March 14, 2014, SDG&E sent Rim Rock a letter regarding the expiration of the ECCA and a separate letter re: Conditional Notice of Termination of PPA (as amended from time to time, the "Conditional PPA Termination Notice") in which SDG&E provided notice of SDG&E's conditional termination of the Green Attributes PPA, subject to the termination of a restraining order by the Montana Court prohibiting SDG&E from stopping payments under the Green Attributes PPA (which restraining order has not yet been lifted), and asserted that Rim Rock had not satisfied the Avian Conditions.

CC. On July 18, 2014, the Montana Supreme Court determined that the parties' contractual agreement to resolve any disputes in San Diego was mandatory, and ordered that the Montana Action be dismissed. The San Diego Court has scheduled a trial for the San Diego Action on May 6, 2016.

DD. On July 2, 2014, MSSF, MS NUSA Member, Grupo NaturEner, and NaturEner USA entered into that certain Transaction Agreement pursuant to which, among other things, effective as of October 1, 2014, the loan under the Loan Agreement was cancelled and MS NUSA Member acquired a controlling equity interest in NaturEner USA which wholly owns, among other entities, NaturEner Borrower, Rim Rock Developer Member, Rim Rock Holdco, and Rim Rock. As a result of the cancellation of the Loan Agreement, the Lender Consents terminated.

EE. The Conditional PPA Termination Notice was subsequently amended by agreement of SDG&E and NaturEner and the termination date was extended in order to allow the parties to discuss settlement pursuant to letter agreements on August 8, 2014, on August 21, 2014, on October 17, 2014, on November 17, 2014, on December 16, 2014, on January 15, 2015, on February 16, 2015, on March 13, 2015, on April 15, 2015, on May 15, 2015, on June 10, 2015, on July 15, 2015, on August 14, 2015, on September 15, 2015, on October 20, 2015, on November 18, 2015, on December 17, 2015, and on January 19, 2016.

FF. In recognition of the costs and risks inherent in pursuing litigation to resolve their disputes, the Parties now desire to fully settle and resolve their disputes and related matters as set forth in this Agreement.

Agreement

NOW, THEREFORE in consideration of the representations, acknowledgments, promises, recitals, mutual covenants, terms and conditions contained herein, and for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

Remaining pages redacted.

Attachment B

Energy Division Authorizing

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298



December 22, 2011

Matt Burkhart
Vice President – Electric & Fuel Procurement
San Diego Gas & Electric Company
8315 Century Park Court
San Diego, CA 92123-1548

Re: D.11-07-002 (SDG&E/Rim Rock Wind Project)

Dear Mr. Burkhart:

In Decision (D.) 11-07-002, the Commission approved with one unrelated modification a Settlement Agreement among San Diego Gas & Electric Company ("SDG&E"), NaturEner Rim Rock Wind Energy ("Rim Rock"), the Commission's Division of Ratepayer Advocates ("DRA") and The Utility Reform Network ("TURN") (collectively the "Settling Parties"). Section 3 of the Settlement Agreement sets forth a process by which SDG&E and Rim Rock provide DRA, TURN and the Director of the Commission's Energy Division with various reports containing updated information about the key inputs in the run of the Base Case Model¹ ("Base Case Model" or "BCM") leading up to Construction Financial Closing. The Settlement Agreement provides DRA and TURN with an opportunity to review and question these key inputs.

The Settlement Agreement (Section 3(h)) further provides for the issuance of an Energy Division Authorizing Letter, the purpose of which is to "confirm that SDG&E and Rim Rock are proceeding to implement the Amended Transaction Agreements and run the Base Case Model in a manner consistent with the Commission's approval of this Settlement Agreement." The Energy Division Authorizing Letter is not subject to an appeal to or request for rehearing with the full Commission.

Under Section 3(f) of the Settlement Agreement, SDG&E and Rim Rock are to, "[a]s soon as reasonably available, but in any event at least thirty (30) days prior to the expected Construction Financial Closing Date for the Project, . . . update the BCM ('Updated BCM') . . . and deliver the Updated BCM to TURN and DRA."

Under Section 3(g) of the Settlement Agreement, "[i]f TURN and DRA object to the use of any of the updated material inputs used in the Updated BCM, they shall notify SDG&E and Rim Rock in writing within five (5) Business Days after receipt of the Updated BCM of their objections ('Objection to Updated BCM Inputs'). . ."

¹ The "Base Case Model" is a sophisticated computer model assessing the multiplicity of costs and revenues associated with the Project's construction and operations. Under the terms of the Transaction Agreements, SDG&E will run the Base Case Model with the most current inputs just prior to Rim Rock obtaining the funds from a third party to construct the Project ("Construction Financial Closing"). That run of the Base Case Model will calculate the final GA Price at which SDG&E will purchase Green Attributes from the Project.

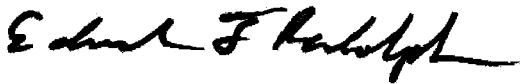
Under Section 3(h) of the Settlement Agreement, "[i]n the event that no timely Objection to Updated BCM Inputs is asserted, the Parties agree that within two (2) Business Days after the later of (a) the five (5) Business Day period for objections has expired, or (b) the date by which one of the Base Case Models is selected in accordance with Section 3(f)(iv), the Director of the Energy Division shall issue a letter ('Energy Division Authorizing Letter').

The Settling Parties have notified me that on November 30, 2011, SDG&E and Rim Rock provided DRA and TURN with the Updated BCM as required under Section 3(f) of the Settlement Agreement. Neither DRA nor TURN asserted a timely Objection to Updated BCM Inputs and DRA and TURN made their selection of one of the Base Case Models in accordance with Section 3(f)(iv) of the Settlement Agreement on December 20, 2011. Thus, in accordance with Section 3(h) of the Settlement Agreement, this Energy Division Authorizing Letter authorizes SDG&E to:

- (i) proceed with the Updated BCM, adjusted consistent with the Base Case Model selected in accordance with Section 3(f)(iv), as it may be further updated by the actual executed hedge price or fixed price contract, and
- (ii) execute the Amended Transaction Agreements and perform its obligations thereunder.

The Settling Parties also have notified me that SDG&E is seeking to add or delay certain conditions precedent in the transaction documents due to potential transmission or project delays in order to enhance or maintain protections for ratepayers while allowing the project to move forward. In the event that SDG&E seeks to waive altogether any of these conditions precedent, SDG&E should notify DRA, TURN and the Energy Division no less than ten days prior to the expected Capital Contribution Closing date.

Sincerely,



Edward F. Randolph
Director, Energy Division

cc: Cheryl Lee
Candace Morey
Yuliya Shmidt
Nancy Murray
Steve Greenwald
Steve Nelson
Despina Niehaus
Matt Freedman

PUBLIC (REDACTED) VERSION

Attachment C

REDACTED IN ITS ENTIRETY

Green Attributes PPA

PUBLIC (REDACTED) VERSION

Attachment D

REDACTED IN ITS ENTIRETY

NOB PPA

Attachment E

Declaration of Emily C. Shults

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Application of San Diego Gas & Electric
Company (U902E) to Amend Renewable
Energy Power Purchase Agreement with
NaturEner Rim Rock Wind Energy, LLC and
for Authority to Make a Tax Equity
Investment in the Project

Application 10-07-017
(Filed July 15, 2010)

DECLARATION OF EMILY C. SHULTS

I, EMILY C. SHULTS, declare that:

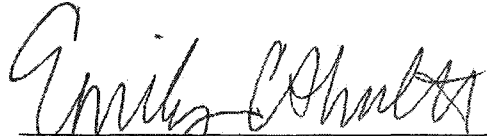
1. I am currently employed by San Diego Gas & Electric Company ("SDG&E") as Vice-President – Electric and Fuel Procurement. I am authorized to make this declaration on SDG&E's behalf. I have personal knowledge of the matters stated herein and could and would testify competently thereto, under oath, if required.
2. I have reviewed the *Petition for Modification of Decision 11-07-002 by San Diego Gas & Electric Company (U 902E) and NaturEner Rim Rock Wind Energy, LLC*, and its supporting attachments, to be submitted in the above-captioned matter ("Petition for Modification").
3. I am informed and believe that the facts set forth in the introduction and recitals to the Avian Conditions Settlement Agreement (attached to the Petition for Modification) are true, except as to matters which are therein stated on information and belief, and as to those matters, I believe them to be true.
4. I am informed and believe that the Green Attributes Power Purchase Agreement dated January 6, 2012 (attached to the Petition for Modification) is a true and correct copy.

5. I am informed and believe that the Nevada-Oregon Border ("NOB") Power Purchase Agreement dated October 26, 2011 (attached to the Petition for Modification) is a true and correct copy.

Further Declarant sayeth not.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 16, 2016 at San Diego, California.



Emily C. Shults
San Diego Gas & Electric Company
Vice President, Electric and Fuel
Procurement